



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: West Georgia Industrial Piping and Plumbing Co.

File: B-225836

Date: April 1, 1987

DIGEST

1. Where the bidding corporation is not named as principal in a surety agreement but rather the president of the corporation is so named and all other evidence in the letter of credit indicates that it is the president to whom the line of credit is extended and on whose credit rating the line of credit is based, there is a material defect in the letter of credit submitted with the bid requiring its rejection; that the bidding corporation is a small business is immaterial.
2. The fact that an agency may have accepted an improper bid guarantee in a prior procurement does not compel the agency to perpetuate the error by again accepting the same inadequate bid guarantee.
3. Where the protester's bid was properly rejected and the protester is not eligible for award, the protester is not an interested party to protest the propriety of the agency accepting the awardee's bid.

DECISION

West Georgia Industrial Piping and Plumbing Co. (WGI) protests the rejection of its bid on invitation for bids (IFB) DACW38-87-B-0004, issued by the Corps of Engineers, Vicksburg District, for the construction of a sewage project.

The protest is denied in part and dismissed in part.

Four bids were received in response to the solicitation and WGI's bid of \$83,917 was the apparent low bid. WGI's bid was subsequently rejected, however, because the contracting officer found the irrevocable letter of credit submitted as a bid guarantee with WGI's bid was materially defective. WGI contends that the contracting officer's objection to the format of the letter of credit is a matter of form rather than substance which may be cured after bid opening or waived as a

minor informality. WGI states that the contracting officer's initial failure to specify the nature of the defect denied WGI due process and effectively prevented WGI from curing the defect.

The contracting officer found the letter of credit materially defective for three reasons, the first of which was that the principal listed on the letter of credit was Mr. B. Randall Hammock instead of the bidding party, WGI.

The letter of credit read as follows:

"Carrollton Federal Savings & Loan does hereby certify that it will extend a line-of-credit to bid the above mentioned job in the amount of \$18,000.00 to B. Randall Hammock, President of West Georgia Industrial Piping & Plumbing Company, Inc. of Carrollton, Georgia."

"This line-of-credit is subject to all checks being made payable to Mr. Hammock and Carrollton Federal Savings & Loan.

"If you need additional information relative to this line of credit or Mr. Hammock's credit rating with Carrollton Federal please advise."

WGI states that the letter of credit refers to the president of WGI, not to Mr. Hammock as an individual. WGI contends that since it is a small business the transactions made by the president of WGI may be viewed as being made by the corporation itself. WGI urges that this is a minor technical error which can be corrected after bid opening. Moreover, WGI states that it sought assistance from the Corps of Engineers for the specific wording of a letter of credit and WGI received instructions from the Corps and prepared the letter of credit based on those instructions.

A letter of credit is essentially a third-party beneficiary contract by which a customer of a financial institution wishing to transact business induces the financial institution to issue the letter to a third party whose drafts or other demands for payment will then be honored upon the third party's compliance with the conditions specified in the letter. The effect and purpose of a letter of credit is to substitute the credit of some entity other than the customer for the credit of the customer. See Chemical Technology, Inc., B-192893, Dec. 27, 1978, 78-2 C.P.D. ¶ 438; see, generally, Juanita H. Burns and George M. Sobley, 55 Comp. Gen. 587 (1975), 75-2 C.P.D. ¶ 400.

The determinative question in judging the sufficiency of a letter of credit is whether the letter of credit could be enforced if a bidder does not execute the required contract documents. See Truesdale Construction Co., Inc., B-213094, Nov. 18, 1983, 83-2 C.P.D. ¶ 591. Generally, suretyship arises only by the express agreement of the surety to be bound on behalf of the principal. Long's Air Conditioning, Inc., B-187566, Jan. 6, 1977, 77-1 C.P.D. ¶ 11. A bidder need not comply with the exact requirements relating to bid bonds in order to be considered responsive, so long as the surety would be liable notwithstanding any deviations. See J. W. Bateson Company, Inc., B-189848, Dec. 16, 1977, 77-2 C.P.D. ¶ 472.

Here, since WGI was not named as principal in the surety agreement, it is doubtful whether the letter of credit could be enforced by the Corps of Engineers, and we do not believe that the government would receive the full and complete protection it contemplated in drafting the IFB. S&S Contracting, 63 Comp. Gen. 450 (1984), 84-1 C.P.D. ¶ 670. We do not think that the mere naming of an individual with his official title in a corporation, as was done in this case, provides sufficient guarantee that the surety is extending the line of credit to the corporation and not to the individual. This is the case here since the letter of credit refers to checks being paid to Mr. Hammock, not to WGI, and since it refers to Mr. Hammock's credit rating and not that of the bidding party, WGI. All indications are that the line of credit is being extended to Mr. Hammock and not to WGI. The fact that WGI is a small business is immaterial since that has no bearing on the legal relationship of the parties.

Moreover, with regard to WGI's contention that the contracting officer should have waived the defect in its letter of credit, we have held that a bid bond which names a principal different from the named bidder is deficient and the defect may not be waived as a minor informality. A.D. Roe Company Inc., 54 Comp. Gen. 271 (1974), 74-2 C.P.D. ¶ 194. We have applied this rule in the case of a similarly defective letter of credit. S&S Contracting, 63 Comp. Gen. 450, supra.

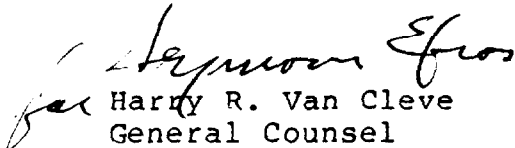
Although WGI states that it received advice on the wording of a letter of credit from the Corps, it does not allege that the Corps approved its use of the president of WGI's name instead of WGI itself in the letter. Even if it had, WGI's bid could not be accepted since the bidder is not the party named in the letter of credit.

WGI has produced similarly worded letters of credit which it states have been accepted by the Corps of Engineers in the past. We have held, however, that the fact that an agency may have accepted an improper bid guarantee in a prior procurement does not compel the agency to perpetuate the error by again accepting the same inadequate bid guarantee. Alan L. Crouch, B-207653, Oct. 19, 1982, 82-2 C.P.D. ¶ 345.

Since the Corps properly rejected WGI's bid because WGI was not named as principal in the surety agreement, we need not examine the Corps' other reasons for finding WGI's bid guarantee materially defective.

WGI, in its comments on the agency report, raises several issues relating to the alleged impropriety in the Corps' accepting the awardee's bid. However, since WGI is not eligible for award and is therefore not an interested party, these protest issues are dismissed. 4 C.F.R. §§ 21.0(a) and 21.1(a) (1986). Moreover, these issues were untimely raised since bid opening was November 13, 1986, and the issues were not raised until February 2, 1987. 4 C.F.R. § 21.2(a)(2).

The protest is denied in part and dismissed in part.


for Harry R. Van Cleve
General Counsel